BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CYNTHIA RADER	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,041,846
	)	
U.S.D. 259	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the October 4, 2013, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on January 22, 2014. Joseph Seiwert of Wichita, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for self-insured respondent.

The ALJ found claimant met with personal injury by accident on August 18, 2008, arising out of and in the course of her employment with respondent. The ALJ indicated no evidence was introduced to support any other accident date or means of accident other than that alleged by claimant. Further, the ALJ found claimant has proven an injury to her left upper extremity only and adopted the rating of Dr. Murati that claimant suffered a four percent impairment to the left upper extremity.

An independent medical examination (IME) was ordered by the Court in February 2011, that due to circumstances was never completed. At the regular hearing, both parties indicated they had no desire to proceed with said IME. Claimant's counsel then moved to have the IME Order reinstated, a motion the ALJ denied on May 1, 2013.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues she has a 27 percent impairment of function and a work disability of 79.8 percent based upon a 59.6 percent task loss and a wage loss of 100 percent. Claimant maintains her average weekly wage is $520.88, and there is an underpayment of temporary total disability. Moreover, claimant contends respondent has produced no

evidence to suggest claimant did not have a workplace injury. Claimant argues that although a court-ordered IME is normally discretionary with the ALJ, once ordered it should not be unilaterally canceled without agreement of the parties. Claimant contends this matter should be remanded to the ALJ to complete the IME, and to reconsider the decision in light of the IME results.

Respondent maintains claimant was a part-time employee, and the ALJ's Award should be modified to reflect an average weekly wage of $409.83. Morever, respondent argues claimant sustained no functional impairment and is not entitled to permanent partial disability benefits for either functional impairment or work disability. In the alternative, respondent contends the ALJ's Award of four percent permanent partial functional impairment to the left shoulder should be affirmed. Finally, respondent argues the ALJ neither exceeded his jurisdiction nor abused his discretion when he denied claimant's request for an IME.

The issues for the Board's review are:

1. What is claimant's date of injury?

2. Did claimant suffer an injury arising out of and in the course of her employment with respondent?

3. What is the nature and extent of claimant's disability?

4. What is claimant's average weekly wage?

5. Should the ALJ have ordered an IME?

FINDINGS OF FACT

Claimant began employment with respondent in 1999 as a lunchroom and breakfast manager. By 2001, she was a paraprofessional, a position requiring the education and care of behaviorally and emotionally disordered children. In August 2008, claimant was assigned to South High School, where she worked with five physically disabled, wheelchair-bound students, ranging in weight from 90 to 170 pounds. These students required assistance in feeding, diapering, and cleaning. Claimant had to lift each student three times per day, a task she had not performed previously.

On August 18, 2008, claimant testified she injured her back, left shoulder, and neck while attempting to lift a student. Claimant indicated she had pain at the time of the incident that gradually worsened. Claimant reported the incident to her supervisor. She worked the remainder of the week and then sought medical attention.

Claimant continued at South High School until August 22, 2008, when respondent transferred her to Minneha, where she worked with smaller pre-kindergarten children. She continued to lift and diaper in this position. Claimant was terminated on September 8, 2009, because respondent could no longer accommodate her restrictions.

Claimant treated with Dr. Mark Dobyns at Wesley Occupational Health in Wichita, Kansas. Dr. Dobyns diagnosed lumbar sprain, left shoulder sprain, and biceps sprain. Claimant was prescribed medication and physical therapy.

Dr. Pedro A. Murati, a physician board certified in physical medicine and rehabilitation, electrodiagnosis, and IMEs, first saw claimant at her former counsel's request on October 9, 2008, for purposes of treatment recommendations. Claimant had multiple complaints, including difficulties sleeping at night due to lower back pain, loss of strength of the left arm, pain in the upper back and neck, pain in the lower back going down into both hips and legs, and numbness and tingling in the lower back going down into the left leg. After obtaining a medical history, reviewing claimant's medical records, and performing a physical examination, Dr. Murati diagnosed left rotator cuff tear with probable labral involvement, myofascial pain syndrome affecting the left shoulder girdle extending into the cervical and thoracic paraspinals, neck pain with signs and symptoms of radiculopathy, left SI joint dysfunction, left trochanteric bursitis, and low back pain with signs and symptoms of radiculopathy. Dr. Murati temporarily restricted claimant and recommended an MRI of the left shoulder, cervical spine, and lumbar spine. He recommended she undergo physical therapy, steroid injections, and receive appropriate medication, and also recommended a surgical evaluation should conservative treatment prove ineffective.

Claimant next treated with Dr. Do, beginning December 2008. Dr. Do ordered MRIs of the cervical spine and lumbar spine, which revealed degenerative disc disease at C4-5, C5-6, C6-7, L2-3, and L4-5. The MRI of claimant's cervical spine also showed a very small posterior central disc/osteophyte complex at C5-6 with minimal effacement. Claimant's left shoulder MRI was unremarkable.

Claimant continued to treat with Dr. Do, undergoing physical therapy and receiving medications. Dr. Do released claimant at maximum medical improvement on March 18, 2009, with no work restrictions.

Dr. Moskowitz, a board certified orthopedic surgeon, first saw claimant on April 2, 2009, for a back pain consultation. Claimant presented with pain in her back and both legs. Dr. Moskowitz took a history of claimant and performed a physical examination. He also reviewed claimant's December 2008 MRI of the lumbar spine and determined it was a "pretty normal MRI."[1] Further, Dr. Moskowitz noted claimant tested positive for five

[1] Moskowitz Depo. at 11.

Waddell signs, indicating she was symptom magnifying. Dr. Moskowitz recommended claimant receive a foraminal epidural steroid injection at L4-L5 on the left in order to "better the situation and to help make a better diagnosis."[2]

Dr. Camden Whitaker, a physician board certified in orthopedics and specializing in the spine, first saw claimant on May 6, 2009, at Dr. Do's recommendation. Claimant presented with left-sided posterolateral neck pain, left shoulder pain, left upper extremity pain, and left upper extremity numbness, tingling, and weakness sensation. Dr. Whitaker took a history of claimant and performed a physical examination. Dr. Whitaker testified regarding the physical examination:

> What is significant is the fact that we didn't find much pathology in terms of muscle weakness, sensory loss, things of that nature. You know, we didn't find any abnormal reflexes or gait abnormalities or any atypical inspections or palpations of her cervical spine.[3]

Further, upon review of claimant's 2008 MRI, Dr. Whitaker agreed with previous assessments. He did not see any focal disc herniation, central stenosis, neuroforaminal narrowing, or nerve compression that could cause arm pain. Because he could not explain why claimant had her reported radicular findings, Dr. Whitaker ordered an EMG nerve conduction study to rule out other sources of nerve compression. His impression at that time was posterolateral neck pain, cervical degenerative disease, and left upper extremity complaints.

Claimant followed up with Dr. Moskowitz on June 1, 2009, after receiving the steroid injection he previously recommended. Claimant reported the injection did not help her. Dr. Moskowitz testified the physical examination he performed on June 1, 2009, was basically no different than the initial examination. He found positive Waddell's signs and stated claimant's x-rays and MRI were essentially normal. Dr. Moskowitz felt claimant was symptom magnifying and noted he could do nothing further for her. Dr. Moskowitz opined claimant did not require additional medical treatment for her low back.

Claimant returned to Dr. Whitaker on June 29, 2009. Claimant brought a previous EMG study to this appointment, which was negative for any focal neuropathy, plexopathy, or radiculopathy. Dr. Whitaker also determined claimant was symptom magnifying and testified he did not have any treatment options for her:

> Q. Largely that was based on what?

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[2] *Id.*, Ex. 1 at 2.

[3] Whitaker Depo. at 6-7.

> A. Basically, it was based on the fact that she had no pathology that I thought was treatable in her neck and the fact that I thought she was overexaggerating or symptom magnifying.[4]

Dr. Whitaker did not place claimant on any restrictions nor schedule subsequent appointments.

Claimant returned to Dr. Murati at the request of her former counsel on July 20, 2009, for purposes of an impairment rating. Claimant's chief complaints were pain in the upper and lower back, pain in the shoulder, the inability to sit or stand for long periods of time due to lower back pain, the inability to turn her head due to pain in the neck, and difficulty performing household activities due to pain in her back and left shoulder. Dr. Murati took a history and performed a physical examination of claimant. He also reviewed x-rays, which were unremarkable. Additionally, Dr. Murati testified claimant's Waddell's signs were negative. Dr. Murati's diagnoses were the same as when he saw her in October 2008, and he noted they were within all reasonable medical probability a direct result from the work-related injury claimant sustained on August 18, 2008, and/or each working day thereafter.

Dr. Murati imposed permanent restrictions on claimant:

> In an eight-hour day, no climbing ladders, no crawl, no above shoulder work, bilaterally, no lift/carry, push/pull greater than 10 pounds, and that only occasional, up to five pounds frequently; rarely bend, crouch, stoop; occasional sit, climb stairs, squat and drive; frequent stand and walk; no work more than 18 inches from the body, bilaterally; avoid awkward positions of the neck; avoid twisting of trunk.[5]

Using the AMA *Guides*,[6] Dr. Murati rated claimant with a four percent left upper extremity impairment for loss of range of motion, which converts to a two percent whole person impairment. For the left torchanteric bursitis, Dr. Murati opined claimant suffered a seven percent left lower extremity impairment, converting to a three percent whole person impairment. Dr. Murati placed claimant in cervicothoracic DRE category III for the neck pain secondary to radiculopathy, rating claimant with a 15 percent whole person impairment. For the low back pain secondary to radiculopathy, he placed claimant in lumbosacral DRE category III for a 10 percent whole person impairment. For myofascial pain syndrome affecting the thoracic paraspinals, Dr. Murati indicated claimant was in

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[4] Whitaker Depo. at 12.

[5] Murati Depo. at 18.

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

thoracolumbar DRE category II for a five percent whole person impairment. These impairments combine for a 31 percent whole person impairment.

Dr. Murati previously rated claimant in 1999 for a separate workers compensation claim. Claimant had a combined preexisting functional impairment of 5 percent to the whole person, lowering Dr. Murati's 2009 rating to a 27 percent impairment to the whole person.

Dr. Paul S. Stein, a neurological surgeon, examined claimant for purposes of an IME at respondent's request on January 21, 2013. After reviewing claimant's medical records and performing a physical examination, Dr. Stein concluded claimant was engaging in symptom magnification. Dr. Stein stated he did not feel claimant was malingering, but rather opined claimant may have some minor injury with a large amount of functional overlay. He testified:

> Functional means it is not anatomic. In other words, it is not a torn muscle or pinched nerve or ruptured disc, it is functional. It is something from the brain. Overlay just means that, as I said, there may be some injury underneath all of this but then there is this tremendous overlay built on top of what frequently is a minor injury.[7]

Dr. Stein recommended claimant be seen by a psychologist to confirm his opinion that there was a "great deal of symptom magnification and that the problem might not be physical."[8] His other suggestion was claimant may suffer from fibromyalgia syndrome, a condition not recognized by the AMA *Guides*. Dr. Stein explained he could not opine regarding claimant's impairment because "without any additional information and with the amount of symptom magnification obscuring anything on examination, [he] couldn't determine that there was a significant structural injury or a permanent impairment of function from this incident."[9] Dr. Stein testified that under the circumstances, he cannot document that claimant requires restrictions. Dr. Stein recommended additional testing, which did not occur.

Claimant was interviewed by two vocational experts: Doug Lindahl at her counsel's request, and Steve L. Benjamin at respondent's request. Both took a work history of claimant and generated a task list constituting her job tasks for the past 15 years. Dr. Murati reviewed the task list prepared by Mr. Lindahl. Of the 47 unduplicated tasks on the list, Dr. Murati opined claimant was unable to perform 28 for a 59.6 percent task loss. Dr.

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[7] Stein Depo. at 13.

[8] *Id*. at 14.

[9] *Id*. at 18.

Stein reviewed the task list provided by Mr. Benjamin. As Dr. Stein did not provide any restrictions for claimant, he opined claimant could perform all tasks on the list.

Claimant has not worked since September 8, 2009. Claimant's current complaints included pain in her back, her left shoulder, her neck, and pain that went up and down her legs and radiated around her hips. Claimant complained of pain that wakes her up every night. She stated her left knee and left arm go numb at night. Claimant testified repetitious activities worsen her pain, and she is limited to light housework. Additionally, claimant stated she can walk, but has some difficulties, and she drags her left leg. Claimant testified she currently takes medications that help with the pain.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d(a) states in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> . . . .
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> (11) For the loss of a hand, 150 weeks.
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> (12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2008 Supp. 44-511(b)(4)(B) states:

[I]f the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and

> customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

ANALYSIS

1. What is claimant's date of injury?

Respondent raised the issue of date of accident at the regular hearing and in their Application for Review to the Board. However, in their brief, respondent did not address the issue of date of accident. Claimant testified that she was injured on August 18, 2008, while lifting a student. Claimant's testimony in this regard is uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.[10] The evidence supports a finding that claimant suffered an injury by accident on August 18, 2008.

2. Did claimant suffer an injury arising out of and in the course of her employment with respondent?

Claimant testified that she was injured on August 18, 2008, while lifting a student. Claimant described the incident with specificity. Claimant's testimony in this regard is uncontroverted. Respondent provided no evidence to suggest that the accidental injury did not occur as described by claimant. The evidence supports a finding that claimant suffered an injury by accident arising out of and in the course of her employment with respondent on August 18, 2008.

3. What is the nature and extent of claimant's disability?

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[11] The primary question in deciding the nature and extent of disability in this claim is: did claimant prove by a preponderance of the evidence that she suffered a neck and low back impairment arising out of and in the course of her employment?

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[10] See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[11] K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

The Board agrees with the ALJ's assessment of permanent impairment. Claimant alleges a whole body impairment based upon Dr. Murati's assessment of neck and low back impairment based upon a finding of radiculopathy. Dr. Murati last examined claimant four and one half years prior to the regular hearing and the examination by Dr. Stein. Dr. Murati's conclusions with regard to the neck and low back are not supported by the weight of the evidence.

Approximately two months before Dr. Murati made findings of cervical radiculopathy, Dr. Whitaker could not find any pathology to explain claimant's neck complaints. Dr. Whitaker could not document any muscle weakness, sensory loss, abnormal reflexes, or gait abnormalities. He ordered an EMG nerve conduction study because none of his examination findings explained claimant's complaints. The EMG was negative and contrary to the findings of Dr. Murati. Dr. Whitaker thought claimant was symptom magnifying.

Approximately three months before Dr. Murati made findings of lumbar radiculopathy, Dr. Moskowitz examined claimant for her complaints of low back pain. Of significant note, Dr. Moskowitz wrote in his report that all five Waddell signs were positive. Dr. Moskowitz testified that three or more positive Waddell signs indicated symptom magnification. Dr. Moskowitz ordered a transforaminal epidural injection as a diagnostic tool. The injection did not provide the relief of leg pain that was expected. After a followup examination of claimant on June 1, 2009, Dr. Moskowitz had no recommendation for additional treatment and continued to believe claimant was symptom magnifying.[12]

Dr. Stein examined claimant on January 21, 2013. His opinions are the only opinions based upon claimant's condition at the time of the regular hearing. Dr. Stein also testified that he believes claimant is a symptom magnifier, to the extent that it interfered with his ability to examine claimant.

While Dr. Stein found claimant might or possibly has fibromyalgia, his statements fall below the required burden that the relationship of the condition to the accidental injury be proven by a preponderance of the evidence. Even if the relationship of the fibromyalgia was related to the accidental injury, Dr. Stein testified that the AMA *Guides* do not provide an impairment for fibromyalgia. The Board agrees with the ALJ and gives greater weight to the opinions of Dr. Stein.

The Board adopts the ALJ's analysis regarding relationship to the accidental injury of and nature and extent of impairment to the left upper extremity.

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[12] Moskowitz Depo., Ex. 2 at 1.

4. What is claimant's average weekly wage?

Respondent argues claimant was a part-time employee. Respondent's position is supported by a wage statement[13] that shows claimant's weekly hours varied from week to week. The wage statement submitted into evidence at the regular hearing shows the most claimant worked in the 26-week period preceding the accidental injury was 33.17 hours. K.S.A. 2008 Supp. 44-511(a)(4) states:

> The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

Claimant testified that she worked 35 hours per week. In this regard, her testimony is inconsistent with the wage statement. Claimant clearly regularly worked less than 35 hours per week and fits within the definition contained in K.S.A. 2008 Supp. 44-511(a)(4)(A). However, to prove someone is a part-time employee under the Act, it must also be shown there is no customary number of hours constituting an ordinary work day.

Claimant testified she worked seven hours per day. In this respect, her testimony is not completely inconsistent with the wage statement. For the two weeks preceding her accidental injury, the wage statement reflects a number of hours worked that when divided by seven results in an even number. The wage statement shows, for the two weeks prior to the accidental injury, claimant worked two seven-hour days during the week ending on August 8, 2008, and four seven-hour days during the week ending on August 15, 2008. The Board finds that claimant is not a part-time hourly employee as defined in K.S.A. 2008 Supp. 44-511(a)(4).

Applying K.S.A. 2008 Supp. 44-511(b)(4)(B), a daily money rate of $104.16 is found by multiplying the hourly rate of $14.88 with the 7 hours claimant customarily worked each day. The daily money rate multiplied by the 5 days claimant worked each week results in an average weekly wage of $520.80.

5. Should the ALJ have ordered an IME?

There is nothing in K.S.A. 44-516 that limits the ALJ's authority or discretion as to when an IME can or cannot be ordered. K.S.A. 44-516 states:

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[13] R.H. Trans., Cl. Ex. 2.

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

The Board has held in prior cases that K.S.A. 44-516 grants the Director discretion to employ one or more neutral health care providers, not exceeding three in number, to make such examinations of an injured employee as the Director may direct. There is no mandate under K.S.A. 44- 516 that the IME powers of the Director under this statute must be used in any specific situation. This being a discretionary act on the part of the Director, an ALJ's decision to not order an IME or follow through with a prior order for an IME would be well within the powers of the ALJ.[14]

CONCLUSION

Claimant suffered an injury by accident arising out of and in the course of her employment with respondent on August 18, 2008. Claimant suffers a four percent impairment of the left upper extremity at the shoulder. Claimant's average weekly wage is $520.80. The ALJ has discretion to order, not order, or withdraw an order for an IME.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated October 4, 2013, is affirmed.

IT IS SO ORDERED.

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[14] See *Semonick v. Servicemaster of Southeast KS*, No. 1,044,572, 2011 WL 800430 (Kan. WCAB Feb. 4, 2011); *Ayers v. Hallmark Cards, Inc.*, Nos. 247,852 and 259,740, 2001 WL 893592 (Kan. WCAB July 31, 2001); *Dunn v. C&L Companions*, No. 189,018, 1994 WL 749289 (Kan. WCAB Aug. 30, 1994).

Dated this _____ day of February, 2014.

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BOARD MEMBER

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BOARD MEMBER

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